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No. 95-412

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

GINA SHAW,

Petitioner,

vs.

JAMES K. HAHN, JOHN EMERSON, JAMES PEARSON, THOMAS HOKINSON, CORY BRENTE, CITY OF LOS ANGELES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUMMARY OF ARGUMENT

Petitioner, Gina Shaw, was a petit juror in a civil case who was excluded from the panel upon the peremptory challenge of respondent Deputy City Attorney Cory Brente. Plaintiff in that case (who was, incidentally, represented by counsel for petitioner herein) challenged petitioner's exclusion, alleging an improper racial bias pursuant to ***Batson v. Kentucky***, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986). After hearing argument at the bench, the trial court determined that respondent's reasons for excluding petitioner were race-neutral and denied the ***Batson*** challenge. (Opinion, ***Shaw v. Hahn, et al.***, 56 F.3d 1128, Petition p.3a.) This decision was neither raised nor alleged as error on plaintiff's appeal from the underlying judgment. (Petition, p.7a fn.4.)

Petitioner then brought suit against respondents alleging that she had been improperly excluded from the jury on the basis of race and that this action violated her right to equal protection of the laws.

The action was dismissed for failure to state a claim and this determination was upheld on appeal. (Petition, Appendix A.)

Petitioner now asks this Court to grant certiorari to consider whether a juror is collaterally estopped from pursuing an independent action for damages for violation of constitutional rights after a third party has already unsuccessfully litigated the question of whether the juror's rights were violated. Although petitioner argues that certiorari should be granted because the Ninth Circuit decided the issue in a manner contrary to controlling authority, the Petition fails to support that contention. None of the cases cited and relied upon by petitioner require any different holding than was issued by the Ninth Circuit. Certiorari is therefore inappropriate because no special or important reasons have been articulated in support of the writ.

Petitioner also argues that the court below has decided the matter in such a way that jurors have been completely precluded from ever pursuing a cause of action for violation of civil rights because of

improper exclusion from a jury on racial grounds. This contention misstates the court's holding which specifically declined to decide the limits of issue preclusion when a third party fails to assert the juror's equal protection rights. (Petition, p.9a fn.5.) Because this issue was neither presented to nor decided by the court below, a grant of certiorari to consider this question would be inappropriate.

Moreover, it is clear from the record that the case was properly decided below and certiorari is unnecessary. To the extent that petitioner possesses a constitutional right, secured by the equal protection clause, not to be excluded from jury service on account of race, that right was previously advanced by the plaintiff in the civil action in which petitioner was selected to sit on the jury. Contrary to petitioner's contention, the issue is not whether petitioner was "stripped" of her standing to assert her constitutional right, but whether that right had already been litigated and petitioner should be barred from improperly prolonging the litigation by raising an issue which was previously decided against her.

ARGUMENT

I.

THE PETITION SHOULD NOT BE GRANTED BECAUSE NO CONFLICT EXISTS AND THE ISSUE PETITIONER ASKS THIS COURT TO DECIDE HAS NOT BEEN DECIDED BELOW.

A petition for writ of certiorari will only be granted when there are special and important reasons therefor. (***Rule 10, Rules of the U.S. Supreme Court.***) Such reasons exist when an opinion has created a conflict among the circuits or when a circuit court has decided a case contrary to Supreme Court precedent. (***Ibid.***) Neither of these conditions exist in the instant case. Further, petitioner asks this court to grant the writ to decide an issue which the Ninth Circuit not only did not resolve but specifically reserved. Certiorari is inappropriate for these reasons and the Petition should therefore be denied.

Respondents agree that this court has recognized

a constitutional "...right not to be excluded from [a jury] on account of race." (***Powers v. Ohio***, 499 U.S. 400, 409, 113 L.Ed.2d 411, 424, 111 S.Ct. 1364 (1991).) This right may be asserted by a party to the lawsuit in which the juror is seated. (***Id.***. at 499 U.S. 415, 113 L.Ed.2d 428; ***Edmonson v. Leesville Concrete Co.***, 500 U.S. 614, 114 L.Ed.2d 660, 679, 111 S.Ct. 2077 (1991), extending the rule in ***Powers*** to civil actions.) However, this court has yet to recognize the existence of, much less establish parameters for, an individual cause of action for damages on behalf of a juror excluded from a particular case against an attorney who exercised a peremptory challenge.

In ***Powers***, this court cited ***Carter v. Greene County***, 396 U.S. 320, 329-30, 24 L.Ed.2d 549, 557, 90 S.Ct. 518 (1970), for the proposition that "...individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf." (***Powers v. Ohio***, ***supra*** at 499 U.S. 414, 113 L.Ed.2d 427.) The plaintiffs in ***Carter***, however, were a class of black citizens who sought

declaratory and injunctive relief against the county jury commissioner to end what they alleged was systematic racial discrimination in the selection of prospective jurors. (***Carter v. Greene County, supra*** at 90 S.Ct. 519.) To respondents knowledge, neither this court nor any circuit court has previously considered the question of whether the "suit" contemplated by ***Powers*** would encompass the creation of the cause of action for damages pled by the individual juror in the lawsuit below.

The Ninth Circuit's decision is thus not in conflict with any Supreme Court authority nor with cases decided in any other circuit. Rather, the court simply decided, based on the circumstances of the case before it, that petitioner's constitutional rights had been raised and litigated by the plaintiffs in the civil action, and that petitioner was precluded from relitigating the question of whether her rights had been violated in a separate action for damages. The court declined to consider whether a juror would be collaterally estopped from pursuing an individual remedy in a separate action if a party to the

underlying lawsuit failed to object to the juror's exclusion from the jury. (Petition, p.9a fn.5.) Petitioner's contention that, pursuant to the court's decision, "under no imaginable circumstances" would a juror be able to pursue a separate remedy for being subjected to a race-based peremptory challenge is thus incorrect. (Petition, pp.12-13.) The relevant circumstances were never presented to the Ninth Circuit and the issue was neither considered nor decided. Certiorari should therefore be denied. (***Ellis v. Dixon***, 349 U.S. 458, 463, 75 S.Ct. 850, 854, 99 L.Ed.2d 1231 (1955).)

II.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER WAS PROPERLY PRECLUDED FROM RELITIGATING WHETHER HER CONSTITUTIONAL RIGHTS WERE VIOLATED.

A juror's equal protection right not to be excluded from jury service on account of race is generally raised by an objection by a party to a

peremptory challenge from the opposing party. (***Powers v. Ohio, supra*** at 499 U.S. 414-15, 113 L.Ed.2d 427-28; ***Edmonson v. Leesville Concrete Co., supra*** at 114 L.Ed.2d 679.) Given the difficulties associated with an individual jurors' pursuing a remedy for an unlawful exclusion from a jury, this court has found that the party objecting to the juror's exclusion has a "congruence of interests" in eliminating racial discrimination from the courtroom sufficient to give that third party standing to assert the juror's rights. (***Powers v. Ohio, supra*** at 499 U.S. 414, 133 L.Ed.2d 427.)

Once the juror's right to equal protection has been asserted and litigated by a ***Batson*** objection, the juror should be prevented from relitigating the same issue of unlawful exclusion by utilizing the procedural device of filing a separate lawsuit. Contrary to petitioner's assertion, the question is not whether the doctrine of issue preclusion has been "elevated above" a constitutional right (Petition, p.8), but whether petitioner should be able to twice litigate the constitutionality of her exclusion from the

jury simply because the interest she is asserting is a constitutional right. Petitioner has cited no authority for the proposition that factual determinations involving constitutional rights deserve different treatment when analyzing issue preclusion than factual determinations involving other interests. Certiorari should therefore be denied since petitioner has not demonstrated that the Ninth Circuit's decision was erroneous.

Petitioner's arguments that collateral estoppel was improperly applied in this case because she was not in privity with the plaintiff in the underlying action, or because the issue of the constitutionality of her exclusion from the jury was not "fully and fairly" litigated, would appear to have been decided against her by the very cases petitioner relies upon in urging this court to grant certiorari. This court's opinion in ***Powers*** in particular devoted considerable analysis to the concept of a third party's standing to raise and litigate the juror's constitutional interests. (***Powers v. Ohio, supra*** at 499 U.S. 410-415, 113 L.Ed.2d 425-428.) The court found that the third

party litigant in the underlying action has a sufficiently close relation, indeed "a bond of trust," with the jurors to afford the third party standing to assert the juror's rights. (*Id.* at 499 U.S. 413, 113 L.Ed.2d 427.) This "congruence of interests" allows the party to raise the rights of the juror and insures that the party will be a "motivated, effective advocate" for the juror's interests. (*Id.* at 499 U.S. 414, 113 L.Ed.2d 427.) This court has thus already found, in effect, that a juror such as petitioner is in privity with the party making a ***Batson*** objection, and also that the juror's rights will be fully and fairly litigated by use of the procedures outlined in ***Batson*** and its progeny. Since there is no question that the ***Batson*** procedures were properly followed in this case, and particularly since plaintiff, represented by petitioner's counsel herein, failed to challenge the ***Batson*** ruling on appeal from the underlying judgment (Petition, pp.3a,7a fn.4), petitioner was properly precluded from relitigating the constitutionality of her exclusion from the jury and certiorari should be denied.

Issue preclusion is appropriate to prevent parties from relitigating issues that have already been decided in previous litigation. (***Kremer v. Chemical Constr. Corp.***, 456 U.S. 461, 466 fn.6, 102 S.Ct. 1883, 1890, 72 L.Ed.2d 262 (1982).) The purpose of the doctrine is to "...relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." (***Allen v. McCurry***, 449 U.S. 90, 94, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).) It is difficult to imagine a more appropriate application of the doctrine of issue preclusion than to bar a juror from pursuing an independent action for damages after being excluded from a jury by use of a peremptory challenge which a court of competent jurisdiction has found was not racially motivated and did not violate the juror's right to equal protection. This determination was correct and certiorari should therefore be denied.

CONCLUSION

As Justice Scalia pointed out in his dissent to ***Powers***, the equal protection right possessed by all citizens is the right not to be excluded from jury *service* on the basis of irrelevant factors such as race, not the right to sit on a particular jury. (***Powers v. Ohio, supra*** at 499 U.S. 423, 113 L.Ed.2d 434. Emphasis in original.) The danger anticipated in ***Powers***' apparent recognition of an individual juror's cause of action (***Id.*** at 499 U.S. 425-26, 113 L.Ed.2d 435) has been realized in the instant lawsuit. If petitioner's interpretation of ***Powers*** is correct, litigants and their counsel now face the prospect of unlimited and unending litigation, not only on the underlying dispute, but also from individual jurors unhappy with their exclusion from the jury panel. It is more logical to conclude, however, that this interpretation is not correct, and that ***Carter*** and ***Powers*** do not authorize the maintenance of independent causes of action for damages after the court has engaged in a ***Batson***

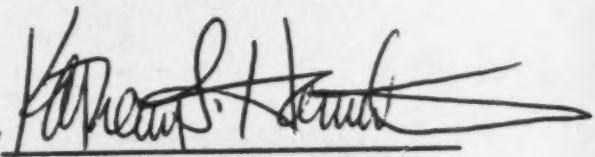
inquiry and found no constitutional violation. The lower courts' determination that any right petitioner may have possessed was adequately advanced by plaintiff in the underlying lawsuit when the ***Batson*** objection was interposed and litigated was correct and should not be disturbed.

For these and the foregoing reasons, it is respectfully requested that this Court deny the petition for writ of certiorari.

DATED: October 4, 1995

Respectfully submitted,

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